

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

In re: BAIR HUGGER FORCED AIR
WARMING DEVICES PRODUCTS
LIABILITY LITIGATION

MDL No. 2666 (JNE/FLN)

This Document Relates to:

**Defendants' Proposed Agenda and
Report for July 19, 2018 Status
Conference**

ALL ACTIONS

Pursuant to Pretrial Order #3, undersigned Counsel submit this Agenda and Status Report for the July 19, 2018 Status Conference:

1. Pretrial Orders and Case Schedule

Case Schedule and Dismissal of *Hives*: On July 11, 2018, the Court entered Pretrial Order No. 26: Amended Scheduling Order for the Bellwethers Second. On July 7, Plaintiff's counsel in *Hives* (17-cv-1696) contacted defense counsel to advise that Ms. Hives was dismissing her case based on "newly discovered evidence." On July 10, the case was dismissed by Stipulation of Dismissal with Prejudice. *Hives* was one of two Joint Nominees in the Bellwethers Second pool; and one of the two cases to be trial-ready on December 3, 2018.

***Lexecon Waivers*:** As the Court is aware, the second bellwether-selection pool from which the eight cases that comprised the "Bellwether Second" were selected consisted of 99 cases. To be considered for bellwether status, Plaintiffs were required to decide whether to waive their right to trial in their home courts. Ultimately, 70 of the 99 plaintiffs waived

their venue rights under *Lexecon* and agreed to trial before this Court. Four of the 70 plaintiffs' cases were later dismissed, leaving 66 cases in the Bellwether Second pool.

Following the *Gareis* verdict, 64 of the 66 remaining plaintiffs filed retractions of their prior *Lexecon* waivers, including all of the now seven bellwether selections. Plaintiffs' position is that the *Lexecon* waivers were invalid for lack of consideration, and that the Court's choice-of-law and other rulings in *Gareis* "resulted in a material difference in the posture of the case." Plaintiffs are concerned about statements made in chambers after the *Gareis* closings in which the Court indicated in the next trial perhaps all the documents and the Augustine issues would come into evidence. Defendants disagree with Plaintiffs' characterization of the Court's comments in chambers.

Defendants submit that Plaintiffs' retraction of their *Lexecon* waivers is invalid and have filed an objection in that regard. Defendants' position is that if Plaintiffs are permitted to unilaterally revoke their *Lexecon* waivers, it will be virtually impossible for any bellwether pool to be populated. Defendants' view is that to the extent a particular bellwether plaintiff no longer wishes to proceed with trial in Minnesota, then his or her claims should be dismissed with prejudice. Last month, Plaintiffs indicated they would submit briefing responsive to Defendants' objection, but no briefing has been submitted to date.

2. Plaintiff Fact Sheets ("PFSs")

Defendants have moved to dismiss an additional set of cases based on alleged PFS deficiencies. That motion is noticed to be heard by the Court at the July 19 status

conference. Defendants have also, as in prior months, addressed lists of PFS disputes to the Court as provided by PTO No. 14. Plaintiffs do not concede that cases included on these lists are in fact deficient.

3. Update on number and status of cases transferred into the MDL

As of July 6, 2018, there were 4,641 active federal Bair Hugger cases pending in this MDL. Not all filed cases have been served on Defendants.

4. Overview of related state court proceedings

On January 8, 2018, Judge Leary granted the Defendants' Motions to Exclude Plaintiffs' General Causation Medical Experts and granted the Defendants' Motion for Summary Judgment with Respect to General Causation. Judgment was entered in the cases pending in Ramsey County on January 26, 2018. On January 31, Judge Leary denied Plaintiffs' letter request for reconsideration.¹ Plaintiffs' appeal is pending. Plaintiffs' (Appellants') opening brief was filed April 27, 2018; Defendants' (Respondents') response was filed June 27; Plaintiffs' reply was filed July 9, 2018.

There are currently three other state court cases pending outside of Ramsey County, Minnesota:

Acosta v. 3M and Arizant Healthcare, Inc., pending in the Fourth Judicial District Court, Missoula County, Montana, Case No. DV-16-769, Dept. No. 4, Plaintiffs are represented by the Rossbach Law Firm. The Acosta case was filed on September 9, 2016. 3M and Arizant have not been served.

¹ Judge Leary has since retired.

Petitta v. Ray R. Trey Fulp III et al., pending in the District Court of Hidalgo County, Texas. Plaintiff is represented by the Garcia & Martinez Law Firm. *Petitta* was filed on November 14, 2016. Only written discovery has occurred. The hospital defendant settled. The remaining co-defendant, the Plaintiff's orthopedic surgeon treating physician, filed an interlocutory appeal after the Court denied his motion to dismiss. Discovery is automatically stayed pending disposition of the interlocutory appeal.

Bythwood v. 3M, Arizant et al., pending in the Circuit Court of Jefferson County, Alabama. Plaintiff is represented by Frank O. Hanson, Jr. *Bythwood* was filed on February 15, 2017. On April 7, 2017, the Court issued an order allowing fact discovery to commence. The Court held a status conference on October 12, 2017, setting a fact discovery deadline of October 11, 2018 and scheduling a status conference for October 12, 2018, at which time the Court will set a trial date and deadlines for dispositive motions and expert disclosures/depositions.

5. Overview of Canadian action

On June 22, 2016, Defendants were served with a Canadian putative class action, *Driessen v. 3M Canada Company, 3M Company, and Arizant Healthcare Inc.*, filed in Ontario Superior Court of Justice, Court File No. 16-69039. Plaintiff Driessen seeks to represent a putative class of “[a]ll persons residing in Canada who had the 3M Bair Hugger Forced-Air Warming Device used on them during surgery.” (Driessen Cplt. ¶ 4.) Plaintiff Driessen is represented by Jeff Orenstein and Andrea Grass of the Consumer Law Group Professional Corporation in Ottawa, Ontario. Defendants have retained Canadian counsel,

Tim Buckley and Kate Crawford of Borden Ladner Gervais. On August 8, 2016, Defendants filed their Notice of Intent to Defend. There has been no recent case activity.

6. Additional pretrial orders (including, but not limited to, rules and procedures, preservation order, and protective order of confidentiality)

There are no pending pretrial orders.

7. Status of Discovery

Bellwether Second: Case-specific written discovery has been served by the parties in all the now 7 cases included in the Bellwether Second pool. Responses and objections have been served and the parties are working to resolve deficiencies identified by Defendants. Defendants produced responsive documents. Defendants are also continuing to collect and review medical records in all cases.

Axline: The following depositions have been taken or are scheduled:

- Ms. Axline's primary care physician, Dr. Wynn (June 26)
- Ms. Axline's infectious disease doctor, Dr. Smith (June 28)
- Plaintiff and her spouse (July 10)
- Ms. Axline's orthopedic surgeon, Dr. Lombardi (July 17)
- Ms. Axline's anesthesiologist, Dr. Narcelles (July 23)

An inspection of the operating room at Mt. Carmel Hospital where Ms. Axline's surgery took place is scheduled for July 23.

8. Status of Post-Trial Motions in *Gareis*

Plaintiffs filed a Motion for a New Trial. Defendants' response is due July 18.

Dated: July 13, 2018

Respectfully submitted:

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